Supreme Court, U.S.
FILED

No. 091312 MAR 9 - 2010

OFFICE OF THE CLERK

In The

Supreme Court of the United States

SERGEI PORTNOY pro se
ELENA PORTNOY pro se

Plaintiffs,

Vs.

UNITED STATES OF AMERICA;
ERIC HOLDER; JANET NAPOLITANO;
EMILIO T. GONZALES.

Defendants.

APPENDIXES
TO
PETITION FOR A WRIT CERTIORARI

Sergei Portnoy
Elena Portnoy
125 Kern Ave.,
Woodland, CA 95695
Phone (530) 666-3076.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
No. 09-16727

D.C. No. 2:09-cv-01935-GEB
Eastern District of California, Sacramento.

SERGEI PORTNOY; ELENA PORTNOY,

Plaintiffs – Appellants,

v.

UNITED STATES OF AMERICA; et al.,

Defendants – Appellees.

ORDER
(Filed 12-10-2009)

Before: GOODWIN, RYMER and CLIFTON, Circuit Judges.

A review of the response to the order to show cause indicates that the questions raised in this appeal are so insubstantial as not to require further argument. *See United States v. Hooton*, 693 F.2d 857, 858 (9th Cir. 1982) (per curiam) (standing standard).

Accordingly, we summarily affirm the district court's judgment.

AFFIRMED

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
No. 09-16727
D.C. No. 2:09-cv-01935-GEB
Eastern District of California, Sacramento.

SERGEI PORTNOY; ELENA PORTNOY,

Plaintiffs – Appellants,

v.

UNITED STATES OF AMERICA; et al.,

Defendant – Appelles.

ORDER
(Filed 08-24-2009)
Before:SCHROEDER and M.SMITH, Circuit Judges.

The emergency motion for stay of deportation and immediate release from detention is denied. *See Hilton v. Braunskill*, 481 U.S. 770, 776 (1987).

A review of the district court record suggests that this case may be appropriate for summary affirmance under Ninth Circuit Rule 3-6(b). *See United States v. Hooton*, 693 F.2nd 857,858 (9th Cir. 1982) (per curiam). Within 21 days after the filing date of this order, appellants shall show cause why the judgment challenged in this appeal should

not be summarily affirmed. See 9th Cir. R. 3-6(b).
If appellants fail to file a response to this order, the Clerk shall dismiss this appeal for failure to prosecute. See 9th Cir. R. 42-1.

Briefing is suspended pending further order of this court.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
2:09-cv-1935-GEB-DAD-PS

SERGEI PORTNOY, et al.,

Plaintiffs,

vs.

UNITED STATES, et al.,

Defendants.

ORDER

Plaintiffs, proceeding pro se, filed the above-entitled action. The case was referred to a United States Magistrate Judge pursuant to Local Rule 72-302 (c)(21).

On July 27, 2009, the magistrate judge filed findings and recommendations herein which were served on plaintiffs and which contained notice to plaintiffs that any objections to the findings and recommendations were to be filed within ten days. Plaintiffs have filed timely objections to the findings and recommendations.

In accordance with the provisions of 28 U.S.C. 636(b)(1)(C) and Local Rule 72-304, this court has conducted a de novo review of this case. Having carefully reviewed the entire file, the court finds the findings and recommendations to be supported by the record and by proper analysis.

Accordingly, IT IS HEREBY ORDERED that:

1. The findings and recommendations filed July27, 2009, are adopted in full;

2. Plaintiffs' July 20, 2009 motion for temporary injunctive relief (Doc. No. 10) is denied for failure to file a brief that addresses all relevant issues presented in the motion, affidavits that justify the relief plaintiffs seek, and an an acceptable explanation for the failure to provide notice of the motion to the affected parties; and

3. This action is dismissed with prejudice since it is duplicative of the previous actions filed by plaintiffs.

Dated: August 5, 2009

GARLAND E. BURRELL, JR
United States District Judge.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
No. CIV S-09-1935 GEB DAD PS

SERGEI PORTNOY, et al.,

Plaintiffs,

v.

UNITED STATES, et al.,

Defendants.

FINDINGS AND RECOMMENDATIONS

Plaintiffs Sergei Portnoy and Elena Portnoy are proceeding pro se with this action and have paid the required filing fee. The proceeding has been referred to the undersigned in accordance with Local Rule 72-302(c)(21) and 28 U.S.C. 636(b)(1).

Plaintiffs seek declaratory and injunctive relief, including a writ of mandamus, for alleged violations of due process and deprivations of property, liberty, and the right to vote. Plaintiffs challenge various actions by the defendants, including an August 30, 2004 order finding plaintiff Elena Portnoy removable and ineligible for adjustment of her immigration status. Plaintiffs indicate that plaintiff Elena Portnoy was recently arrested pursuant to that order.

Plaintiffs have been litigating Elena Portnoy's immigration status since at least 2001. (See Compl. at 4-5.) litigation has taken place in the Ninth

Circuit Court of Appeals and in the United States District Court for the Northern District of California, as well as in the United States District Court for the Eastern District of California. In the Eastern District of California, plaintiffs' previous cases regarding Elena Portnoy's immigration status are (1) Portnoy, et al. v. United States, et al., case No. CIV S-05-0649 DFL KJM PS, filed on April 4, 2005 and dismissed on September 26, 2006; and (2) Portnoy, et al. v. United States of America, et al., case No. CIV S-08-1266 MCE GGH PS, filed on June 6, 2008 and dismissed on April 6, 2009.

In case No. CIV S-05-0649, plaintiffs' claims concerning Elena Portnoy's final removal order were dismissed for lack of subject matter jurisdiction because all challenges to final orders of removal are to be filed in the United States Circuit Courts of Appeals. (Findings & Recommendations filed Aug. 10, 2006 in case No. CIV-S-05-0649 DFL KJM PS, at 1-2, adopted in full by Order filed Sept. 26, 2006.) Summary judgment was granted for defendants on plaintiffs' remaining claims in that action. Claims challenging the denial of Sergei Portnoy's petition for immediate relative status for Elena Portnoy and the denial of Elena Portnoy's application to adjust status to lawful permanent resident were found to be barred under the principles of res judicata. (Id. At 2) In addition, it was determined that plaintiffs had failed to exhaust their administrative remedies with respect to the petition for immediate relative status and the application for adjustment of status. (Id.) Claim challenging the denial of plaintiff Elena Portnoy's application for naturalization were found to lack merit because a de novo review of the record

revealed that plaintiff could not overcome her failure to establish the statutory prerequisite of being lawfully admitted to the United States as a permanent resident. (Id.) In the absence of a valid challenge to the denial of Elena Portnoy's application for naturalization, defendant were entitled to summary judgment on her Fifteen Amendment claim of having been denied the right to vote in federal elections. (Id. At 2-3.) The district judge's order adopting the magistrate judge's findings and recommendations, granting defendants' motion to dismiss plaintiffs' claim contesting the final removal order, and granting defendants' motion for summary judgment on plaintiffs' remaining claims was affirmed on appeal on April 9, 2007.

In case No. CIV S-08-1266, the assigned magistrate judge found that plaintiffs' complaint was very similar to the complaint in their 2005 case. (Order filed Sept. 9, 2008 in case No. CIV S-08-1266 MCE GGH PS, at 2-3.) The magistrate judge explained the defects of the pleading in detail granted plaintiffs "one opportunity to amend their complaint in order to state a cognizable claim against proper defendant(s) that has not previously been decided by this court." (Id. At 5.) Upon finding that plaintiffs' amended complaint contained allegations virtually indentical to the allegations in their 2005 case, the magistrate judge recommended that the action be dismissed due to its duplicative nature. (Findings & Recommendations filed Dec. 11, 2008 in case No. CIV-S-08-1266 MCE GGH PS, at 1.) The findings and recommendations were adopted in full by order filed April 6, 2009, and that order of dismissal was affirmed on appeal on June 30, 2009.

In this action, plaintiffs' complaint again contains factual allegations virtually identical to the allegations in their 2005 and 2008 cases, except for the additional allegation that plaintiff Elena Portnoy was arrested by defendants on July 10, 2009 and taken into custody. Plaintiffs assert eleven claims for relief, of which ten were previously raised in plaintiffs' 2005 and 2008 cases. The ten duplicative claims challenge defendants' denial of plaintiff Sergei Portnoy's petition for immediate relative status for Elena Portnoy, defendants' denial of plaintiff Elena Portnoy's application for adjustment of status, and defendants' denial of plaintiff Elena Portnoy's application for naturalization.[1] Plaintiffs' eleventh claim is an assertion that plaintiff Elena Portnoy's arrest has deprived her of liberty in violation of the Fifth Amendment. This conclusory assertion appears to attack plaintiff Elena Portnoy's final removal order.

The undersigned finds that this action is duplicative of the actions previously filed by plaintiffs. Accordingly, the undersigned will recommend that the action be dismissed as duplicative and that the dismissal be with prejudice, as it is now evident that plaintiffs cannot overcome the district court's lack of subject matter jurisdiction

[1] In their eighth ninth claims, plaintiffs now allege that defendants have deprived plaintiff Elena Portnoy of the rights to earn money, work, and receive Social Security benefits. Lake plaintiffs' claim that plaintiff Elena Portnoy has been denied the right to vote in federal elections, these claims are predicated on plaintiffs' challenge to the denial of plaintiff Elena Portnoy's application for naturalization, a challenge that was adjudicated in defendants' favor in plaintiffs' 2005 case.

over challenges to final orders of removal or the res judicata bar arising from plaintiffs' previous litigation.

Plaintiff' complaint was accompanied by an emergency motion for preliminary injunction. The motion was denied in orders filed by the assigned district judge on July 16, 2009 and July 17, 2009. Plaintiffs have filed a renewed motion for temporary injunctive relief along with an "informal" brief and a notice concerning lack of notice to the affected parties. Plaintiffs have not cured the defects of their emergency motion, and the renewed motion should be denied.

In accordance with the above, IT IS HEREBY RECOMMENDED that:

1. Plaintiffs' July 20, 2009 motion for temporary injunctive relief (Doc. No. 10) be denied for failure to file a brief that addresses all relevant issues presented in the motion, affidavits that justify the relief plaintiffs seek, and an acceptable explanation for the failure to provide notice of the motion to the affected parties; and

2. This action be dismissed with prejudice.

These findings and recommendations will be submitted to the United States District Judge assigned to this case, pursuant to the provisions of 28 U.S.C. 636(b)(1). Within ten days after being served with these findings and recommendations, plaintiffs may file written objections with the court. A document containing objections should be titled "Objections to Magistrate Judge's Findings and Recommendations." Plaintiffs are advised that failure to file objections within the specified time may, under certain circumstances, waive the right

to appeal the District Court's order. See Martinez v. Ylst, 951 F. 2d 1153 (9th Cir. 1991).

DATED: July 27, 2009.

DALE A. DROZD
UNITED STATES MAGISTRATE JUDGE

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
No. 09 – 15789

D.C. No. 2:08-cv-01266-MCE-GGH
Eastern District of California, Sacramento.

SERGEI PORTNOY; et al.,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA; et al.,

Defendants-Appellees.

ORDER
(Filed 8-24-2009)

Before: KOZINSKI, Chief Judge, PAEZ and TALLMAN, Circuit Judges.

Appellants' petition for rehearing is construed as a motion for reconsideration of this court's June 30, 2009 order summarily affirming the district court's judgment. So construed, the motion is denied. See 9th Cir. R. 27-10.

No further filings shall be accepted in this closed case.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
No. 09-15789

D.C. No. 2:08-cv-01266-MCE
Eastern District of California, Sacramento.

SERGEI PORTNOY; et al.,

Plaintiffs – Appellants,

v.

UNITED STATES OF AMERICA; et al.,

Defendant – Appellees.

ORDER

(Filed 6-30-2009)

Before: KOZINSKI, Chief Judge, PAEZ and TALLMAN, Circuit Judges.

A review of the record and the response to the order to show cause indicates that the questions raised in this appeal are so insubstantial as not to require further argument. *See United States v. Hooton*, 693 F.2d 857, 858 (9th Cir. 1982) (per curiam) (summary affirmance appropriate where result is clear from face of record). The district court did not abuse its discretion in dismissing appellant's complaint without prejudice as duplicative of an earlier-filed action. *See Adams v. Cal. Dept. of Health*

Servs., 487 F.3d 684,688 (9th Cir. 2007).

Accordingly, we summarily affirm the district court's judgment.

All pending motion are denied as moot.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
No. CIV-S-08-1266 MCE GGH PS

SERGEI & ELENA PORTNOY,

Plaintiff,

vs.

UNITED STATES OF AMERICA, et al.,

Defendants.

ORDER

On December 11, 2008, the magistrate judge filed findings and recommendations herein which were served on the parties and which contained notice that any objections to the findings and recommendations were to be filed within ten days. Plaintiffs filed objections on December 22, 2008, and they were considered by the district judge.

This court review de novo those portions of the proposed findings of fact to which objection has been made. 28 U.S.C. 636(b)(1); McDonnell Douglas Corp. v. Commodore Business Machines, 656 F. 2d 1309, 1313 (9th Cir. 1981), cert. denied, 455 U.S. 920 (1982). As to any portion of the proposed findings of fact to which no objection has been made, the court assumes its correctness and decides the motions on the applicable law. See Orand v. United States, 602 F.2d 207, 208 (9th Cir. 1979).

The magistrate judge's conclusions of law are reviewed de novo. See Britt v. Simi Valley Unified School Dist., 708 F.2d 452, 454 (9th Cir. 1983).

The court has reviewed the applicable legal standards and, good cause appearing, concludes that it is appropriate to adopt the Findings and Recommendations in full.

Accordingly, IT IS ORDERED that:

1. The Findings and Recommendations filed December 11, 2008, are ADOPTED; and

2. This action is dismissed without prejudice. See Fed. R. Civ. P. 41(b).

Dated: April 3, 2009

MORRISON C. ENGLAND, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
No. CIV-S-08-1266 MCE GGH PS

SERGEI & ELENA PORTNOY,

Plaintiffs,

vs.

UNITED STATES OF AMERICA, et al.,

Defendants.

FINDINGS & RECOMMENDATIONS

Plaintiffs are proceeding pro se and in forma pauperis. Plaintiffs' amended complaint is before the court. The court's own records reveal that on April 4, 2005, plaintiffs filed a complaint containing virtually indentical allegations against the same defendants. (No. Civ. S-05-0649 DFL KJM PS).[1] That case resulted in a termination favorable to defendants, and was affirmed on appeal. Due to the duplicative nature of the presented action, the court will recommend that the complaint be dismissed. See Adams v. Cal. Dept. Of Health Services, 487 F.3d 684, 688 (9th Cir. 2007).

In accordance with the above, IT IS HEREBY RECOMMENDED that this action be dismissed without prejudice. See Fed. R. Civ. P. 41(b).

[1] A court may take judicial notice of court records. See MGIC Indem. Co. v. Weisman, 803 F. 2d 500, 505 (9th Cir. 1986); United States v. Wilson, 631 F. 2d 118, 119 (9th Cir. 1980).

These findings and recommendations are submitted to the District Judge assigned to this case pursuant to the provisions of 28 U.S.C. 636(b)(1). Within twenty days after being served with these findings and recommendations, plaintiffs may file written objections with the court. The document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Plaintiffs are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Y1st, 951 F.2d 1153 (9th Cir. 1991).

DATED: December 11, 2008

/s/ Gregory G. Hollows

UNITED STATES MAGISTRATE JUDGE

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 06 – 16956

D.C. No. CV-05-00649-DFL

SERGEI PORTNOY; et al.,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA; et al.,

Defendants-Appellees.

MEMORANDUM*
(Filed 4-09-2007)
Appeal from the United States District Court
For the Eastern District of California
David F. Levi, District Judge, Presiding

Submitted April 4, 2007**

Before: O'SCANNLAIN, GRABER and BEA, Circuit Judges.

A review of the record and the opening brief indicated that the questions raised in this appeal are

so insubstantial as not to require further argument. *See United States v. Hooton*, 693 F.2d 857, 858 (9th Cir. 1982) (per curiam) (stating standard).

Accordingly, we summarily affirm the district court's judgment.

AFFIRMED.

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
No. CIV S-05-0649 DFL KJM PS

SERGEI PORTNOY, et al.,

Plaintiffs,

vs.

UNITED STATES, et al.,

Defendants.

ORDER

Plaintiffs, proceeding pro se, filed the above-entitled action. The matter was referred to a United States Magistrate Judge pursuant to Local Rule 72-302(c)(21).

On August 10, 2006, the magistrate judge filed findings and recommendations herein which were served on the parties and which contained notice to the parties that any objections to the findings and recommendations were to be filed within ten days. No objections to the findings and recommendations have been filed.

The court has reviewed the file and finds the findings and recommendations to be supported by the record and by the magistrate judge's analysis. Accordingly, IT IS HEREBY ORDERED that:

1. The finding and recommendations filed August 10, 2006, are adopted in full;

2. Defendants' motion to dismiss is granted on plaintiffs' claim contesting the removal order; and

3. Defendants' motion for summary judgment is granted on the remaining claims.

DATED: 9/25/2006

DAVID F. LEVI
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
No. CIV S-05-0649 DFL KJM PS

SERGEI PORTNOY, et al.,

Plaintiffs,

vs.

UNITED STATES, et al.,

Defendants.

FINDINGS AND RECOMMENDATIONS

Pending before the court is defendants' motion to dismiss and/or for summary judgment. Upon review of the documents in support and opposition, and good cause appearing therefore, THE COURT FIND AS FOLLOWS:

In this case, plaintiffs assert various claims challenging actions by the Bureau of Citizenship and Immigration Services. Defendant move for summary judgment, contending this court is without jurisdiction to hear the merits of plaintiff Elena Portnoy's challenge to her order of removal and that the government is entitled to summary judgment on the remaining claims.

Elena Portnoy challenges her final removal order. All challenges to final orders of removal are to be filed directly in the Circuit Courts of Appeals. 8 U.S.C. 1252. Plaintiff has filed such a petition in

the Ninth Circuit, where her case is pending. See Kudinova v. Gonzales, No. 05-76377 (9th Cir. Filed Nov. 8,2005). At this court is without jurisdiction, plaintiff's claim cannot be maintained here and should be dismissed.

Both plaintiffs also challenge the denial of a petition made by plaintiff Sergei Portnoy in 2000 to accord plaintiff Elena Portnoy immediate relative status as the spouse of a United States citizen. Administrative Record ("AR")[1] 13. In conjunction with that petition, plaintiff Elena Portnoy filed an application to adjust her status to become a lawful permanent resident. AR 22-26. The petition and application were denied in July 2001, because plaintiffs filed to provide evidence of a divorce from the husband to whom plaintiff Elena Portnoy indicated she was married when she applied for a visa to enter the United States. AR 40-43, 159-162. The arguments raised by plaintiffs in the instant action have been fully adjudicated by plaintiffs in an action they filed in the Northern District of California, Portnoy v. United States, No. C-03-4238 MJJ slip op. (N.D. Cal. Mar. 9, 2005). AR 151-172. This claim therefore is barred under the principles of res judicata. Moreover, plaintiffs never provided the requested information, did not file a waiver application, did not file a motion to reopen and did not file a new petition. 8 C.F.R. 103.5(a). Plaintiffs thus have failed to exhaust their administrative remedies, as required. Defendants are entitled to summary judgment on this claim.

Plaintiffs also allege a claim in connection with the denial of plaintiff Elena Portnoy's application for naturalization. AR 173-182. The application was denied because plaintiff failed to provide evidence she was lawfully admitted for permanent residence. AR 205-206. Reviewing the record de novo, the court finds no error in the denial of plaintiff's application for naturalization. See 8 S.F.R. 336.9(c). Plaintiff cannot overcome her failure to establish the statutory prerequisite of being lawfully admitted to the United States as a permanent resident. 8 U.S.C. 1427(a).

Plaintiff Elena Portnoy also raises a claim under the Fifteenth Amendment that she has been denied the right to vote in federal elections. This claim is predicated on the right to be naturalized. Because defendants are entitled to summary judgment on the naturalization claim, the Fifteenth Amendment claim should be summarily adjudicated as well.

Plaintiffs further allege a claim under the Freedom of Information Act ("FOIA"). In opposition to defendants' motion, plaintiffs submit a letter from the Immigration and Naturalization Service indicating that in response to plaintiff Elena Portnoy's request for records, 118 pages of material were provided to plaintiff Elena Portnoy on July 30, 2002. Pls.' Opp'n at 21 (Ex. 6). Plaintiffs have not explained what other records they are seeking or what documents they believe the government is withholding from disclosure. Under these circumstances, summary judgment should be in favor of defendants on the FOIA claim.

Accordingly, IT IS HEREBY RECOMMENDED that:

1. Defendants' motion to dismiss be granted on plaintiffs' claim contesting the removal order; and

2. Defendants' motion for summary judgment be granted on the remaining claims.

This findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. 636(b)(1). Within ten days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served and filed within ten days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Y1st, 951 F.2d 1153 (9th Cir. 1991).

DATED: August 10, 2006.

Kimberly J. Mueller
UNITED STATES MAGISTRATE JUDGE

U.S. DEPARTMENT OF JUSTICE
Civil Division, Tort Branch
Federal Tort Claims Act Staff

June 16, 2005

Honorable Robert Devine
Chief Counsel
Department of Homeland Security
Bureau of Citizenship & Immigration Services(BCIS)
Naval Security Station
Nebraska & Massachusetts Avenue, N.W.
Washington, D.C. 20528

RE: Administrative Tort Claim of Sergei Portnoy and Elena Portnoy.

Dear Mr. Devine:

The Department of Justice received the above-captioned administrative tort claim dated January 21, 2005, on January 31, 2005. Because the claim arises out of the activities of the Department of Homeland Security, in accordance with 28 C.F.R. 14.2(b)(1), I am forwarding the matter to your office for appropriate action. Claimant has been advised of the referral and requested to direct all further communication regarding the matter to your office.

Very truly yours,

PHYLLIS J. PYLES
Director Tort Branch, Civil Division

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
No. 05-76377

Agency No. A78-188-052

ELENA KUDINOVA,

Petitioner,

V.

MICHAEL B. MUKASEY,Attorney General,

Respondent.

MEMORANDUM*
(Filed 9-04-2008)

On Petition for Review of an Order of the
Board of Immigration Appeals
Submitted August 26, 2008**

Before: SCHROEDER, KLEINFELD, and IKUTA,
Circuit Judges.

Elena Kudinova, a native and citizen of Georgia, petition for review of the Board of Immigration Appeals' order summarily affirming an

immigration judge's ("IJ") decision denying her application for adjustment of status and ordering her removed. Our jurisdiction is governed by 8 U.S.C. 1252. Reviewing de novo, *Altamirano v. Gonzales*, 427 F.3d 586, 591 (9th Cir. 2005), we deny in part and dismiss in part the petition for review.

Contrary to Kudinova's contention, the government met its burden of establishing Kudinova's removability by clear and convincing evidence. Kudinova provided evidence that she entered the United States on December 4, 1998 with authorization to stay for six month, and the record shows that she received an extension to remain until December 3, 1999, but she did not depart or gain lawful status by that date. See 8 U.S.C. 1229a(c)(3)(A); Altamirano, 427 F.3d at 590. The IJ therefore properly found Kudinova removable under 8 U.S.C. 1227(a)(1)(B).

We lack jurisdiction to review Kudinova's challenge to the agency's July 26, 2001 decision denying the I-130 immediate relative visa petition filed by her husband. See 8 U.S.C. 1252.

Kudinova's remaining contentions are unpersuasive.

PETITION FOR REVIEW DENIED in part; DISMISSED in part.

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously find this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

File: A78-188-052- San Francisco Date: 10-31-2005

In re: KUDINOVA, ELENA

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se

ORDER:

PER CURIAM. The Board affirms, without opinion, the result of the decision below. The decision below is, therefore, the final agency determination. See 8 C.F.R. 1003.1(e)(4).

FURTHER ORDER: Pursuant to the Immigration Judge's order and conditioned upon compliance with conditions set forth by the Immigration Judge and the statute, the alien is permitted to voluntary depart from the United States, without expense to the Government, within 60 days from the date of this order or any extension beyond that time as may be granted by the Department of Homeland Security (DHS). See section 240B (b) of the Immigration and Nationality Act; 8 C.F.R. 1240.26(c),(f). In the event

the alien fails to so depart, the alien shall be removed as provided in the Immigration Judge's order.

NOTICE: If the alien fails to depart the United States within the time period specified, or any extensions granted by the DHS, the alien shall be subject to a civil penalty of not less than $1,000 and not more than $5,000, and shall be ineligible for a period of 10 years for any further relief under section 240B and sections 240A, 245, 248, and 249 of the Immigration and Nationality Act. See section 240B(d) of the act.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
San Francisco, California

File No. : A 78 188 052	)	August 30, 2004
	)	
In the Matter of	)	
	)	
ELENA KUDINOVA	)	IN REMOVAL
	)	PROCEEDINGS
Respondent	)	

CHARGE: Section 237(a)(1)(B) –non-immigrant remained longer than permitted.

APPLICATIONS: Adjustment of status.

ON BEHALF OF RESPONDENT:	ON BEHALF OF DHS:
Pro se	Jaime Salinardi Assistant District Counsel Department of Homeland Security

DECISION OF THE IMMIGRATION JUDGE

The respondent appeared in removal proceedings at San Francisco, California, pursuant to a Notice to Appear (Exhibit 1), which charges that

she is a non-immigrant alien, who has remained in the United States longer than permitted, and, is, therefore, deportable and removable, pursuant to Section 237(a)(1)(B) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) (hereinafter referred to as the Act).

When pleading to the Notice to Appear, the respondent admitted the factual allegations 1 and 2. She denied factual allegations 3 and 4. She designated New Zealand as the country for removal. This Court has designated Georgia as the country for removal, the country of which she is a citizen and national.

In the course of removal proceedings, the respondent submitted documents, which indicate in pertinent part that she was admitted to the United States on December 4, 1998 as a visitor for pleasure. She was to have remained three weeks, but she filed for an extension of stay as a visitor in the United States and she was granted an extension to remain in the United States lawfully from June 4, 1999 to December 3, 1999. On November 9, 1999, she again applied for an extension of her non-immigrant status, but there has been no ruling as of yet with regard to that application. See Exhibit 2.

While in the United States, the respondent married a United States citizen, identified as Sergei Portnoy. They were married in the city and county of San Francisco, on March 17, 2000. The marriage certificate was seen and returned to the respondent. On July 26, 2001, the respondent was notified that her application for benefits, pursuant to Section 245 of the Immigration and Nationality Act, as amended, were denied. The basis for the denial was that the

visa petition to accord her immediate relative status, filed by her spouse, the United States citizen, Sergei Portnoy, was denied.

In the course of removal proceeding, after the Court had designated Georgia as the country for removal, the respondent was specifically queried with regard to whether or not she feared for her life or freedom on account of race, religion, nationality, membership in a particular social group, or political opinion, if returned to Georgia. The respondent were equivocal. The Court, therefore, specifically asked her whether, under the circumstances, she wished to apply for asylum, withholding of removal or protection under Article 3 of the Convention against Torture. After discussion off the record with here citizen spouse, she indicated that she did not wish to submit any of those applications.

Currently, therefore, she has applied for adjustment of status for the Court's consideration of adjustment of status. That application must be pretermitted, because she does not have an approved visa petition and without a visa petition, pursuant to Section 245(a), there is no immigrant visa available to her.

The Court will consider sua sponte an application for voluntary departure, based upon her marriage to the United States citizen.

The only observation the Court can make under the circumstances is that there is no appeal currently pending the denial of visa petition. The matter has been submitted to the Ninth Circuit Court of Appeals, on presumably, a petition for review. Since this Court has no jurisdiction as previously indicated over the I-130 petition,

the Court can only grant her the relief of voluntary departure.

ORDER

The respondent's application for adjustment of status in the United States is denied.

The respondent shall be permitted to depart the United States voluntarily, provided that she do so on or before October 29, 2004. Should she fail to depart the United States as instructed by this Court, then the privilege will be automatically withdrawn and an order for her removal to Georgia entered.

As a condition of voluntary departure, the respondent must appear before an officer of the Department of Homeland Security within five days of the date of this decision for the purpose of posting a $500 departure bond, and the presentation of a valid travel document, in this case, her Georgian passport, which is valid through November 30, 2006. Should she fail to meet these conditions, then the privilege of voluntary departure will be withdrawn automatically and an order for her removal to Georgia entered.

Finally, should she fail to depart the United States, pursuant to the instructions of this Court or any other legal authority, then for a period of ten years, she will be ineligible for adjustment of status or change of status or cancellation of removal or voluntary departure or registry.

BRIAN H. SIMPSON
United States Immigration Judge

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
No. 04 – 15635

D.C. No. CV-03-04238-MJJ
Northern District of California
San Francisco

SERGEI PORTNOY,

Plaintiff-Appellant,

v.

CHARLES H. DEMORE,
District Director, INS,

Defendant-Appellee.

ORDER
(Filed 11-02-2004)

Before: KOZINSKI, HAWKINS and THOMAS, Circuit Judges

Appellees' motion to dismiss this appeal for lack of jurisdiction is granted. *See WMX Technologies, Inc. v. Miller*, 104 F.3d 1133 (9th Cir. 1997) (dismissal of complaint with leave to amend is not appealable). All other pending motions are denied as moot.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
No. 04 – 15635

D.C. No. CV-03-4238-MJJ
Northern California
(San Francisco)

SERGEI PORTNOY,

Plaintiff-Appellant,

v.

UNITED STATES, et al.,

Defendant-Appellees.

ORDER
(Filed 07-08-2004)

Before: CANBY, KOZINSKI and PAEZ, Circuit Judges

Appellant's motion for reconsideration of this court's May 21, 2004 order dismissing this appeal for lack of jurisdiction is granted. A review of the record demonstrates that appellant's March 23, 2004 notice of appeal was intended to challenge the district court's March 17, 2004 final order in case no. C-03-4238-MJJ. This appeal is reinstated and the Clerk shall amend the docket to reflect the above caption.

The briefing schedule shall proceed as follows: appellant's opening brief is due July 30, 2004; appellees's answering brief is due August 30, 2004; and appellant's optional reply brief is due within 14 days of service of appellees answering brief.

A review of the district court docket reflects that appellant has not paid the docketing and filing fees for this appeal. Within 21 days from the date of entry of this order, appellant shall: (1) file a motion with this court to proceed in forma pauperis; (2) pay $255.00 to the district court as the docketing and filing fees for this appeal and provide proof of payment to this court; or (3) otherwise show cause why the appeal should not be dismissed for failure to prosecute. If appellant fails to comply with this order, the appeal will be dismissed automatically by the Clerk under Ninth Circuit Rule 42-1.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
No. 04 – 15635

D.C. No. CV-01-03334-MJJ
Northern California
(San Francisco)

SERGEI PORTNOY,

Plaintiff-Appellant,

v.

CHARLES H. DEMORE, District Director, INS,

Defendant-Appellee.

ORDER
(Filed 05-21-2004)

Before: CANBY, KOZINSKI and PAEZ, Circuit Judges

A review of the record demonstrates that this court lacks jurisdiction over this appeal because the March 23, 2004 notice of appeal was not filed within 60 days from entry of the October 31, 2002 final order. See Fed. R. App. P. 4(a)(1); *Alexander v. Sacha*, 439 F.2d 742 (9th Cir. 1971) (requirement of timely notice of appeal is jurisdictional).

See also Fed. R. App. P. 4(a)(7) (time to appeal begins to run 150 days from entry of final order that is not properly entered as separate judgment). Consequently, this appeal is dismissed for lack of jurisdiction.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA
No. C-03-4238-MJJ

SERGEI PORTNOY,

Plaintiff,

v.

UNITED STATES, et al.,

Defendants.

ORDER GRANTING MOTION TO DISMISS
(Filed 03-17-2004)

On November 17, 2003, Defendant filed a Motion to Dismiss Plaintiff's Complaint on grounds of res judicata and for the reasons set forth in this Court's October 31, 2002 Order Granting Defendant's Motion to Dismiss Plaintiff's Complaint against the United States and Charles H. Demore, INS Director (C-01-3334). For the reasons set forth in this Court's Order of October 31, 2002, the Court hereby GRANTS Defendants' Motion to Dismiss. Plaintiff is granted twenty days from the date of this Order to file an amended complaint correcting the jurisdictional deficiencies articulated in the Court's prior Order.

IT IS SO ORDERED.

Martin J. Jenkins
UNITED STATES DISTRICT JUDGE

U.S. DEPARTMENT OF HOMELAND SECURITY
Office of the Regional Councel
24000 Avila Road, Room 6080
Laguna Niguel, CA 926787-3400
Mailing Address:
POB 30080
Laguna Niguel, CA 92607-0080

April 15, 2003

CERTIFIED-RETURN RECEIPT REQUESRED

Sergei Portnoy
54 McAllister St
Apt 202
San Francisco, CA 94102

Dear Mr. Portnoy:

The claim you submitted has been refered to this office for determination.

Any recovery under the Federal Tort Claim Act must be predicated upon a showing of a negligent of wrongful act or omission of a federal government employee acting within the scope of his/her employment. 28 U.S.C. 1346(b).

This office has reviewed the circumstances surrounding this incident and has determined that you have failed to establish that any negligent or wrongful act or omission of a federal government employee caused this incident to occur.

Therefore, your claim must be and hereby is denied.

If you are dissatisfied with this determination, you may file suit in appropriate United States District Court not later than six months after the date of mailing of this notification of denial. 28 U.S.C. 2401(b).

Very truly yours,

William B. Odencrantz
Regional Counsel

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA

SERGEI PORTNOY
Plaintiff,

v.

CHARLES H. DEMORE
District Director, INS,
Defendant.

No. C 01-3334 MJJ

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

INTRODUCTION

Before the Court is defendant's motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1), for lack of jurisdiction over the subject matter. Having read and considered the papers, the Court GRANT defendant's motion to dismiss for the following reasons.

FACTUAL BACKGROUND

On October 22, 1998, Elena Kudinova, a citizen and resident of Russia, applied for a nonimmigrant visa to visit the United States. Defendant's Reply in support of Motion to Dismiss ("Reply"), Ex. D. On her visa application she indicated that she was married to another Russian

citizen, Andrei Stadnikov. Id. Ms. Kudinova was granted a visa to enter the United States. Reply at 3.

On or about March 17, 2000, Sergei Portnoy ("plaintiff") married Elena Kudinova. Plaintiff's Opposition to Defendant's Motion ("Opp'n"), Ex. 1 at 1.[1] On April 10, 2000, Sergei Portnoy filed a petition with the Immigration and Naturalization Service ("INS") seeking to accord his wife Elena Kudinova immediate relative status as the spouse of a United States citizen. Defendant's Motion to Dismiss ("Motion"), Ex. A. Plaintiff's petition was filed in conjunction with his wife's application for adjustment of status to become a lawful permanent resident. Motion, Ex. B.

On April 9, 2001, the INS held an interview with plaintiff's wife, Elena Kudinova. Opp'n, Ex. 4. At the interview and in a sworn affidavit, Ms. Kudinova stated that prior to her marriage to Sergei Portnoy, she had never been married.Opp'n, Ex.7,9.[2] Ms. Kudinova's statement that "I had a boyfriend with whom I lived for sometime [sic], and that's what I figured was marriage" suggests that Ms. Kudinova

[1] Plaintiff's Opposition to Defendant's Motion to Dismiss is entitled "Response." For clarity, that document will be referred to as "Opposition."

[2] The Court declines to express an opinion as to whether Elena Kudinova is or ever was married to Andrei Stadnikov and whether a divorce is necessary for Ms. Kudinova's marriage to Sergei Portnoy to be legal in the United States. Documents provided to the court also refer to Elena Kudinova by the name Elena Portnoy. Opp'n, Ex. 7. For clarity, the Court will refer to her as Elena Kudinova.

filled out her visa application incorrectly when she indicated that she was married to Andrei Stadnikov. Opp'n, Ex. 9; Reply, Ex. D. On April 9, 2001, the INS requested a copy of the final divorce decree between plaintiff's wife Elena Kudinova and her (allegedly) prior husband Andrei Stadnikov. Opp'n, Ex. 6. Plaintiff emphatically and repeatedly stated that because Ms. Kudinova and Mr. Stadnikov were never married, it was not possible for plaintiff to provide documentation of a divorce. Opp'n, at 2. Plaintiff filed to submit the requested evidence of a final divorce decree to the INS and, as a result, on July 26, 2001, plaintiff's petition was denied. Motion, Ex. A. Because the petition was denied, the INS also denied plaintiff's wife Ms. Kudinova's application for adjustment of status. Motion, Ex. B. As result of the INS denial of plaintiff's and his wife's petitions, Ms. Kudinova has lost eligibility for Medi-Cal benefits and Section 8 housing, and her employment authorization apparently was revoked. Opp'n, at 2, Ex. 13,14,15; Motion, Ex. B.

On or about August 3, 2001, plaintiff filed the first of four actions with the Small Claims Division of the County of San Francisco, Superior Court of California. Motion, Ex. C. All four of plaintiff's actions were filed against the District Director of the INS, Charles H. Demore, and seek damages at least $1,519 for illegal actions, presumably the denial of plaintiff's and his wife's petitions.[3] *Id.* The United

[3] Adding the amounts requested in each of the four claims, the total amount of damages plaintiff seek is $7,774. It appears that each of plaintiff's four claims is simply a renewal of the original claim.

States Attorney for the Northern District of California removed all four actions to federal court on the basis that plaintiff alleges a tort claim against a federal official.[4] Motion at 2. On August 7, 2002, defendant filed the motion to dismiss presently before the Court.

ANALYSIS

I. Jurisdictional Prerequisites under the INA

A. Exhaustion of Administrative Remedies under the INA

Plaintiff's complaints against the INS fail because he has not exhausted his administrative remedies as required by statute.

Under the Immigration and Naturalization Act 242(d)(1), 8 U.S.C. 1252(d)(1) ("INA"),"[a] court may review a final order of removal only if—(1) the alien has exhausted all administrative remedies available to the alien as of right...."
Rashtabadi v. INS, 23 F3d 1562, 1567 (9th Cir. 1994) (quoting *Vargas v. United States Dep't of*

> Absent overriding justification, an alien must exhaust his administrative remedies prior to seeking review of a deportation order. Failure to raise an issue in an appeal to the BIA [Board of Immigration Appeals] constitutes a failure to exhaust remedies with respect to that question and deprives this court of jurisdiction to hear the matter.

[4] The four claims were consolidated.

Immigration and Naturalization, 831 F.2d 906, 907-08 (9th Cir. 1987)).

Plaintiff has failed to exhaust several different administrative remedies available to him. First, plaintiff failed to submit a Form I-601 for a waiver of inadmissibility to the United States. Reply at 3. Submitting a Form I-601 allows the INS to exercise its discretion to determine whether a misrepresentation, such as Ms. Kudinova's apparent misrepresentation of her marital status on her visa application, should be waived.[5] The submition of a Form I-601 waiver of inadmissibility to the INS for adjudication allows the petitioner to submit evidence and documentation that the removal of the exchange visitor (Elena Kudinova) would be an extreme hardship upon a United States citizen or permanent resident (Sergei Portnoy). *See* 8 U.S.C. 1186a(c)(4). However, plaintiff did not file a Form-601. Reply at 3. Plaintiff also failed to submit a petition and final divorce decree, which was requested by the INS. Motion at 5; Reply at 3; Opp'n, Ex. 5, 6, 10. The INS gave plaintiff notice that failure to file the Form-601 or a petition and final divorce decree would be deemed grounds for denial of the petition. Opp'n Ex. 5, 6. Because plaintiff did not file anything, the INS denied plaintiff and his wife's petitions due to abandonment.[6] Opp'n, Ex. 10;*see* 8 C.F.R.103.2(b)(13) The fact that plaintiff neglected to submit either Form I-601 or a petition and final divorce decree

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[5] *See* 5 Immigration Law and Procedure (MB) 63.07(3)(f)(i) (Dec. 2000, Apr. 2000).

[6] Pursuant to 8 C.F.R. 103.2(b)(15), a denial due to abandonment may not be appealed, but an applicant or petitioner may file a motion to reopen under 103.5 A denial due

constitutes failure to exhaust an administrative remedy.

Next, the INS informed plaintiff that the denial of a petition due to abandonment cannot be appealed, but that plaintiff could file a motion to reopen. Opp'n, Ex. 10; see 8 C.F.R. 103.5. At this point, there were at least two administrative remedies still available: filing a motion to reopen and filing a motion to reconsider. In a conclusory fashion, plaintiff appears to argue that he could not file a motion to reopen because he had no substantive basis on which to file the motion. Opp'n at 3. Contrary to plaintiff's assertion, it appears that he may have been able to file a motion to reopen pursuant to 8 C.F.R. 103.5(a)(2)(i), on the basis that "[t]he requested evidence [of divorce] was not material to the issue of eligibility." In any event, plaintiff did not file a motion to reopen within the 30-day deadline. Motion at 5; Reply at 3; *see* 8 C.F.R. 103.5(a)(1)(i). This failure to file a motion to reopen also constitutes failure to exhaust an administrative remedy. Alternatively, plaintiff could have filed a motion to reconsider, arguing that "the decision was incorrect based on the evidence of record at the time of the initial decision." 8 C.F.R. 103.5(a)(3). Lastly, the INS informed plaintiff that he could file a new petition. Opp'n, Ex. 10. To date, plaintiff has not filed a new petition, but it is not clear whether failure to File a new petition can be considered a failure to Exhaust administrative remedies. Reply at 3. In any

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to abandonment does not preclude the filing of a new application or petition with a new fee. 8 C.F.R. 103.2(b)(15); Opp'n, Ex. 10. It appears that plaintiff also could have filed a motion to reconsideration. *See* 8 C.F.R. 103.5(a)(3).

event, plaintiff has failed to file either a motion to reopen or a motion to reconsider. Because plaintiff has not exhausted the administrative remedies available to him, the Court finds that it lacks jurisdiction to resolve his complaint.[7]

B. Exceptions to the Administrative Exhaustion Requirement

Court have recognized an exception to the administrative exhaustion requirement for constitutional challenges.[8] Even if plaintiff's claims can be construed as alleging a constitutional procedural due process violation, such claims fail because the procedural errors plaintiff alleges are precisely the type of errors which require exhaustion.

> An exception to the exhaustion requirement has been carved for constitutional challenges to the Immigration and Naturalization Act and INS procedures. Because the BIA has no jurisdiction to adjudicate constitutional issues, the Act's exhaustion requirements does not preclude petitioner from raising them for the

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[7] The case law uniformly indicates that administrative remedies must be exhausted first, before filing a lawsuit. *See e.g., Taniguchi v. Schultz*, Nos. 00-16928, 00-71053, 2002 WL 1941421 (9th Cir. 2002) (holding that petitioner's claim of citizenship failed because she had not exhausted her administrative remedies as required by statute), *Joo v. INS*, 813 F.2d 211, 211-12 (9th Cir. 1987) (holding that alien waived right to appeal by departing from the United States, which constituted a failure to exhaust administrative remedies and thus deprived the court of jurisdiction).

[8] See Rashtabadi, 23 F.3d at 1567.

> first time before the Court of Appeals.
>
> Notwithstanding the exception, "a petitioner cannot obtain review of procedural errors in the administrative process that were not raised before the agency merely by alleging that every such error violates due process." Those allegations do not guarantee review in the court of appeals of "procedural errors correctable by the administrative tribunal."

Rashtabadi, 23 F.3d at 1567 (citations omitted).[9]

In *Rashtabadi*, the court held that it lacked jurisdiction to resolve issues that had not been presented to the BIA. *See id.* Rashtabadi raised two issues on appeal that he had not raised before the BIA: that the immigration judge had failed to advise him of his constitutional and statutory rights, and that his attorney admitted deportability without his consent. *See id.* The court reasoned that "Rashtabadi's allegations of due process violations are exactly the sorts of procedural errors which require exhaustion." *Id.* "Given the opportunity, the BIA could have corrected any of the alleged procedural errors." *Id.*

Applying the reasoning found in Rashtabadi to Present case reveals that plaintiff's complaint do not qualify as an exception to the requirement that administrative remedies must be exhausted before filing a lawsuit. Plaintiff suggests that the INS abused its discretion by not crediting Elena

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[9] *See also Agyeman v. INS*, 296 F.3d 871, 878 (9th Cir. 2002) (holding that plaintiff's due process claim had been properly exhausted before the Board of Immigration Appeals).

Kudinova's sworn statement in affidavit form in which she stated that she had never been married prior to her marriage to Sergei Portnoy. Opp'n, Ex. 7. Instead, the INS apparently relied on Ms. Kudinova's earlier statement in her visa application in which she indicated that she was married to Andrei Stadnikov. Reply, Ex. D. To process plaintiff's and his wife's petitions, the INS requested that plaintiff and his wife submit Form I-601 for a waiver of inadmissibility and a petition and final divorce decree between Elena Kudinova and Andrei Stadnikov. Opp'n, Ex. 5, 6. Plaintiff and his wife failed to respond to the INS request and their petitions were denied. Opp'n, Ex. 5, 6, 10; *see* 8 C.F.R. 103.2(b)(13).

Plaintiff's complaints appear to suggest that the INS committed procedural errors by not crediting Elena Kudinova's statement that she had never been married previous to her marriage to Sergei Portnoy. Plaintiff argues that because Elena Kudinova was never married to Andrei Stadnikov, it was not possible to provide evidence of a divorce. Opp'n at 2. Thus, plaintiff apparently suggests that the INS committed procedural errors by demanding documentation that could not possibly exist, and then denying the application for failure to provide the (nonexistent) document.[10]

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[10] Plaintiff also suggests that the INS committed procedural errors by not processing the plaintiff's and his wafe's petitions with six month. Opp'n at 1. The authority plaintiff cites, 8 U.S.C. 1201, explains that immigrant visas are valid for six months. Opp'n, Ex.2; see also 8 U.S.C. 1201. Contrary to plaintiff's assertion, the authority plaintiff cites does not stand for the proposition that the INS must process a petition to

If the INS committed a procedural error by requesting a final divorce decree when one allegedly could not exist, such an error would be exactly the type of procedural error that requires exhaustion. Plaintiff had several options available to exhaust. Plaintiff could have submitted the Form I-601,but he did not. If plaintiff was mistaken, and Ms. Kudinova had been married to Andrei Stadnikov, plaintiff could have obtained documentation of a final divorce decree and submitted it with a petition to the INS, but plaintiff did not do so. When the plaintiff did not submit the requested forms and the INS denied plaintiff's petition, plaintiff could have filed a motion to reopen or a motion to reconsider with the District Director, but he did not. See 8 C.F.R. 103.5.

Ms. Kudinova's denial of adjustment of status could have been reviewed in connection with deportation proceedings before an Immigration Judje.[11] If plaintiff had followed proper procedures, on review, a District Director, then an Immigration

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accord immediate relative status and an application for adjustment of status to become a lawful permanent resident within six months. Instead, 8 C.F.R. 103.2(b)(18) indicates that if an investigation has been undertaken concerning the petition (or application) and has not been completed within one year of its inception, the INS district director may determine whether the petition or application should be held in abeyance for six months. Section 103.2(b)(18) permits the District Director to determine that adjudication of the petition may be held in abeyance for at least 12 months, and that a regional commissioner can further hold adjudication in abeyance indefinitely. *See also* 3A Am. Jur. 2d *Aliens and Citizens* 218 (2002).

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[11] *Id.*

Judge and, perhaps upon a subsequent appeal, the Board of Immigration Appeals, could have corrected any of the alleged procedural errors.[12] This series of omissions demonstrates that plaintiff failed to exhaust the administrative remedies available for the alleged procedural errors of the INS. Therefore, the Court lacks jurisdiction to review whether the INS abused its discretion or committed procedural errors in denying plaintiff's and his wife's petitions.

II. Jurisdictional Prerequisites under the FTCA

A. Exhaustion of Administrative Remedies under the FTCA

"Because [plaintiff] raised his claims pro se, we construe them liberally." *Agyeman v. INS*, 296 F.3d 871, 878 (9th Cir. 2002). It is not entirely clear from plaintiff's complaints and opposition exactly what legal claims he is alleging, but as a pro se plaintiff, the Court will interpret his claims liberally. Defendant construes plaintiff's complaints as claiming damages for negligent or wrongful acts allegedly committed by government employees acting in the course and scope of their employment. Motion at 3. Defendant argues that plaintiff has not exhausted the administrative remedies available under the Federal Tort Claim Act for pursuing a tort claim against the United States. Motion at 3-4. Thus, defendant argues that plaintiff has not satisfied the

[12] *See* 2 Immigration Law Service (CBC) 18:9 (Dec. 1995).

jurisdictional prerequisites for the Court to adjudicate plaintiff's complaint. *Id. Jerves v. United States*, 966 F.2d 517, 518-19 (9th Cir. 1992). "Presentment of an administrative claim is jurisdictional and must be pleaded and proven by the FTCA claimant." *Bellecourt v. United States*, 994 F.2d 427, 430 (8th Cir. 1993) (citing *Bailey v.*

> The Federal Tort Claim Act, 28 U.S.C. 1346,2671-2680..["FTCA"], waives the sovereign immunity of the United States for action in tort. The Act vests the federal district courts with exclusive jurisdiction over suits arising from the negligence of Government employees. However, the Act further provides that before an individual can file an action against the United States in district court, she must seek an administrative resolution of her claim.....
>
> ....A tort claimant may not commence proceedings in court against the United States without first filing her claim with an appropriate federal agency and either receiving a conclusive denial of the claim from the agency or waiting for six month to elapse without a final disposition of the claim being made....[T]his claim requirement of section 2675 is jurisdictional in nature and may not be waived.[13]

United States, 642 F2d 344, 347 (9th Cir. 1981))[14]

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[13] Title 28 U.S.C. 2675(a) provides, in relevant part:
An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the

In *McNeil v. United States*, 508 U.S. 106, 113 (1993), the Court held that "[t]he FTCA bars claimants from bringing suit in federal court until they have exhausted their administrative remedies. "McNeil, proceeding without counsel, filed a complaint in district court invoking the FTCA and alleging that the United States Public Health service had caused him serious injuries. *Id.* At 107-08. Several month later, McNeil submitted an administrative claim for damages to the Department of Health and Human Services, which was denied. *Id.* At 108. At the time McNeil filed his lawsuit, he "had neither presented his claim to the Public Health Service, nor had his claim been 'finally decided' by that agency." *Id* at 111. McNeil filed the lawsuit "too early." *Id.* The Supreme Court upheld the district court's upheld the district court's dismissal of the lawsuit because McNeil commenced the action before satisfying the administrative exhaustion requirement of 2675(a). *See id.* at 109, 113.

Bound by the reasoning of McNeil, the Court must dismiss the present action because plaintiff has filed the lawsuit before filing an administrative tort claim with the INS and without having exhausted

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appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section.

[14] *See also Holloman v. Watt*, 708 F.2d 1399, 1402 (9th Cir. 1983) (holding that since plaintiffs did not file an administrative tort claim, the Federal Tort Claim Act's waiver of sovereign immunity was not available to them).

the administrative remedies available to him. Plaintiff's complaints allege that the INS District Director engaged in " illegal " actions for which plaintiff demand damages of at least $1,519. Motion,Ex. C. Plaintiff appears to allege that the INS District Director engaged in negligent or wrongful ...s when he requested the evidence of a final divorce decree despite Ms. Kudinova's sworn statement that she had not been previously married, and when he subsequently denied plaintiff's petition to accord his wife immediate relative status and Ms. Kudinova's application for adjustment of status to become a lawful permanent resident. Opp'n at 1-3. Thus, defendant interprets plaintiff's complaints as alleging torts. Motion at 3. If plaintiff has alleged torts committed by the United States, plaintiff is required first to file an administrative tort claim with the INS and exhaust the administrative remedies available to him, before filing a lawsuit against the United States. Plaintiff has not filed an administrative tort claim with the INS. Motion at 4. Because plaintiff has filed to satisfy the jurisdictional prerequisites of filing an administrative tort claim and exhausting the administrative remedies available to him, the Court lacks jurisdiction over plaintiff's tort claims against the INS.

B. Applicability of the FTCA

Even if plaintiff had filed an administrative tort claim and exhausted his administrative remedies, plaintiff's tort claim would still fail because the FTCA does not apply to acts of discretion and the FTCA does not waive sovereign immunity for

claim with no legal basis.

"[T]he INS' decision to grant an adjustment of status is purely discretionary." *Rashtabadi*, 23 F.3d at 1568.

> The FTCA does not apply to any claim "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. 2680(a)..... Further, the FTCA waives sovereign immunity only where the United States, "if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b).

Cato v. United States, 70 F.3d 1103, 1110 (9th Cir. 1995)

The INS' apparent decision to credit Ms. Kudinova's statement in her visa application that she was married to Andrei Stadnikov, and not to credit her later statement insisting that she had never been married before her marriage to Sergei Portnoy, was the performance of a discretionary function by a government officer and therefore not subject to suit under the FTCA. Plaintiff and his wife failed to respond to the INS request that Ms. Kudinova resolve the question of marital status by submitting either a Form I-601 for a waiver of inadmissibility or a petition and final divorce decree. Opp'n, Ex. 5, 6, 10. The INS denial of plaintiff's and his wife's petitions for failure to submit either of these forms was the performance of a discretionary function, appears to have been consistent with procedures, and thus was not an abuse of discretion.

See Rashtabadi, 23 F.3d at 1568; *see also* 8 C.F.R. 103.2(b).[15] Therefore, even if plaintiff were to file an administrative tort claim with the INS and exhaust his administrative remedies concerning such a claim, and then file an amended complaint in federal court, no jurisdiction would lie.

III. Waiver of Sovereign Immunity

Defendant argues that plaintiff's suit is barred by the doctrine of sovereign immunity and that plaintiff has filed to identify a wavier of sovereign immunity.

A. Official Capacity

"It is well settled that the United States is a sovereign, and, such, is immune from suit unless it has expressly waived such immunity and consented to be sued." *Gilbert v. DaGrossa*, 756 F.2d 1455, 1458 (9th Cir. 1985) (citations omitted). "Such waiver

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[15] See 8 C.F.R. 103.2(b)(2)(i) ("The non-existence or other unavailability of required evidence creates a presumption of ineligibility");
8 C.F.R. 103.2(b)(8) ("If there is evidence of ineligibility in the record, an application or petition shall be denied on that basis notwithstanding any lack of required initial evidence"); 8 C.F.R. 103.2(b)(13) ("If all requested initial evidence and requested additional evidence is not submitted by the require date, the application or petition shall be considered abandoned and, accordingly, shall be denied."); 8 C.F.R. 103.2(b)(16)(iii) ("Where an application may be granted or denied in the exercise of discretion, the decision to exercise discretion favorably or unfavorably may be based in whole or in part on classified information...").

cannot be implied, but must be unequivocally expressed." *Id.* "The party who sued the United States bears the burden of pointing to such an unequivocal wavier of immunity." *Holloman v. Watt*, 708 F.2d 1399, 1401 (9th Cir. 1983) (citation omitted).

> Where a suit has not been consented to by the United States, dismissal of the action is required. "It is axiomatic that the United States may not be sued without its consent and that the existence of such consent is a prerequisite for jurisdiction."
>
> ...It has long been the rule that the bar of sovereign immunity cannot be avoided by naming officer and employees of the United States as defendant. Thus, a suit against IRS employees in their official capacity is essentially a suit against the United States. As such, absent express statutory consent to sue, dismissal is required.

Gilbert, 756 F.2d at 1458 (citation omitted).

Plaintiff's complaints name as the defendant Charles H. Demore, District Director of the INS in San Francisco. Motion, Ex. C. Plaintiff alleges "illegal actions" by Mr. Demore as the basis of the complaints. *Id.* To the extent that Mr. Demore was sued in his official capacity, the suit is considered to be against the United States. Plaintiff fails to identify a statute that waives immunity and provides the expresses consent of the United States to the claims in plaintiff's complaints. As discussed earlier, to the extent that plaintiff alleges torts under the FTCA, plaintiff has failed to exhaust the administrative remedies available to him and thus the Court lacks jurisdiction to consider such claims. Also, to the extent that plaintiff alleges

constitutional (Fifth Amendment) procedural due process violations, the Court lacks jurisdiction because plaintiff has filed to exhaust administrative remedies available with the INS under theINA.[16]
Because there exists no waiver or statutory consent
By the United States for the claims in the present suit
The Court concludes that any claims against defendant Demore in his official capacity are barred by the doctrine of sovereign immunity.[17]

B. Individual Capacity

"[S]overeign immunity does not bar damage actions against federal official in their individual capacity for violation of an individual's constitutional rights." *Gilbert*, 756 F.2d at 1459. However, defendants as individual may be immune from suit if

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[16] As noted in *Gilbert v. DaGrossa*, 756 F.2d 1455, 1459 n.3 (9th Cir. 1985), Although neither party mentions it... reliance on [the Administrative Procedures Act] 5 U.S.C. 702 would also be misplaced. Although the statute waives sovereign immunity by standing that an action brought by a person suffering legal wrong because of agency action shall not be dismissed on the ground that it is against the United States or that the United States is an indispensable party, it expressly limit such waiver *to actions seeking relief other than money damages.*
In the present case, plaintiff has requested monetary damages and has not specifically requested declaratory or injunctive relief. Motion, Ex. C. However, plaintiff has noted that his wife suffered damages such as lost eligibility for Medi-Cal benefits and for Section 8 housing, and her employment authorization apparently was revoked. Opp'n, at 2, Ex.13,14,15; Motion Ex. B.

they are eligible for qualified immunity. *See Hutchinson v. United states*, 677 F.2d 1322, 1328 (9th Cir. 1982). "[A] government officer acting in the course of his official duties is insulated from suit if (1) there existed reasonable grounds for the belief that the challenged action was appropriate, and (2) the officer acted in good faith." *Id.*

Plaintiff's complaints could be construed as alleging that defendant violated plaintiff's constitutional (Fifth Amendment) procedural due process rights. However, as discusses earlier, plaintiff must first file an administrative claim with the INS and exhaust administrative remedies before filing a lawsuit alleging procedural due process violations. Defendant's denial of plaintiff's and his wife Ms. Kudinova's petitions may not have been a procedural error or an abuse of discretion.
Ms. Kudinova indicated on her visa application that she was married to Andrei Stadnikov. Reply, Ex. D. Ms. Kudinova later stated that she had not been

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the plaintiff's and his wife's petitions was (arguably) not a "legal wrong." Thus, it seems unlikely that plaintiff could offer a successful 702 argument. *See also Cato*, 70 F.3d at 1107 n.5, 1111. *See* 3A Am. Jur. 2d *Alien and Citizens* 218 (2002) ("The Administrative Procedure Act applies to review of administrative decisions under the Immigration and Nationality Act").

[17] This conclusion is supported by the holdings in both *Gilbert v. DaGrossa*, 756 F.2d 1455, 1459 (9th Cir. 1985) (upholding district court decision that claims against IRS employees sued in their official capacities were barred by the doctrine of sovereign immunity), and *Hutchinson v. United States*, 677 F.2d 1322, 1327 (9th Cir.1982) (upholding district court decision that as to both the United States and IRS employees sued in their official capacities, the claims were barred by the doctrine of sovereign immunity).

married, before her marriage to Sergei Portnoy. Opp'n, Ex.7, 9. Given these conflicting statements, there existed reasonable grounds for the defendant to request that Ms. Kudinova clarity her marital status by submitting a Form I-601 for a waiver of inadmissibility or a petition and final divorce decree. Opp'n, Ex. 5, 6. Contrary to plaintiff's assertions, defendant's denial of plaintiff's and his wife's petitions appears to have been reasonable, consistent with procedures, and done in good faith. Defendant is entitled to qualified immunity because he was acting in the course of his official duties, there existed reasonable grounds for denial of Ms. Kudinova's application, and he acted in good faith. Thus, plaintiff has failed to establish a constitutional procedural due process violation.

The Court dismisses the present action for lack of subject matter jurisdiction. The Court lack jurisdiction for three independent reason: (1) plaintiff has failed to exhaust administrative remedies available under the Immigration and Nationality Act, (2) plaintiff has failed to exhaust administrative remedies available under the Federal Tort Claim Act, and (3) plaintiff has failed to identify a statutory waiver of sovereign immunity for his claims.

CONCLUSION

Based on the reasons stated above, the Court finds that it lacks jurisdiction to review plaintiff's claims against the INS. Therefore, the Court GRANTS defendant's motion to dismiss plaintiff's complaints.

IT IS SO ORDERED. Dated: October 29, 2002

MARTIN J. JENKINS U. S. DISTRICT JUDGE